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IN THE

Supreme Court of the United States

TIMOTHY J. RUSSELL AND ANITA L. RUSSELL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

SHELDON E. HOCHBERG
Counsel of Record
CHARLES G. COLE
SAAD GUL
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Amicus Curiae American Land Title Association

223499

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF THE *AMICUS CURIAE*

The American Land Title Association ("ALTA") is the national trade association of the land title industry. ALTA has approximately 3,000 members, including land title insurers, title insurance agents, abstracters, and associate members, that do business in almost all counties throughout the United States.[1]

ALTA's interest in this case arises from the common interest of its members and their insureds in the clarity, certainty, and predictability of laws affecting title to and rights in real estate. Confusion in those rules leads to claims, litigation, and uncertainty for both title insurers and those who hold interests in real estate. Ultimately, such uncertainty creates impediments to the free transfer of property and the healthy functioning of real estate markets, with the consequence of potentially lower real estate values and reduced liquidity for all.

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[1] The parties have consented to the filing of this *Amicus Curiae* brief. The consent letter of the United States has been filed with the Clerk. On May 26, 2009, petitioners' counsel filed their consent to the filing of *amicus* briefs in support of either party. Counsel of record for all parties received notice at least 10 days prior to the due date of ALTA"s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the ALTA made a monetary contribution to its preparation or submission. First American Title Insurance Company, which has insured the petitioners' interest in the property at issue, is paying the cost of the petition. That company is a member of ALTA.

The Tenth Circuit's decision below, *Russell v. United States*, 551 F.3d 1174 (10th Cir. 2008), threatens to create significant uncertainty about the viability of state law remedies provided to purchasers at foreclosure sales, and subsequent purchasers from them, in the event that, through inadvertence, the Internal Revenue Service ("IRS") fails to receive notice of the foreclosure sale when it has a tax lien on the property. As a consequence of the current downturn in the economy, the number of foreclosure sales is, unfortunately, extraordinarily high. Similarly, the number of IRS tax liens has increased dramatically in recent years. At present, there are more than one million federal tax liens outstanding. Thus, the potential that state law remedies available to address and remedy omitted IRS liens will be preempted has widespread implications of concern to ALTA and its members.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For a number of reasons, junior lienholders, such as the IRS, sometimes do not receive notice of a foreclosure proceeding. Most states provide that the foreclosure sale has no effect in extinguishing the lien of a party who does not receive notice (referred to as an "omitted party"). Regardless, Federal law establishes that in *all* states, if the IRS fails to receive notice of a foreclosure sale, the sale is "made subject to and without disturbing" the IRS lien. I.R.C. § 7425(b)(1) (2006).

A great many states, like Colorado in this case, provide post-sale statutory or equitable remedies to enable the owner of the foreclosed property to "quiet

the title" against such omitted parties by placing the junior lienholder in essentially the same position it would have been in if it had received notice. These remedies have historically been enforceable in situations when the IRS is the omitted junior lienholder. *See Tompkins v. United States*, 946 F.2d 969 (11th Cir. 1991); *First Am. Title Ins. Co. v. United States*, 848 F.2d 969 (9th Cir. 1988). This is consistent with the instruction in *United States v. Brosnan*, 363 U.S. 237 (1960), that, while matters affecting federal tax liens are matters of federal law, state law governing the divestiture of federal tax liens should be adopted as federal law, except to the extent that Congress may have entered the field.

The Tenth Circuit's decision in this case directly precludes one of those remedies from being applied to an omitted IRS lien. That remedy—requiring the IRS to exercise its right of redemption within a court-ordered period or have that right extinguished against the property in the hands of the new owner—is provided by statute or common law not only in Colorado, but in a number of other states including New York and New Jersey. The Tenth Circuit's holding was not compelled by the applicable federal statute. The court concluded that I.R.C. § 7425 "'occup[ies] the field'," 551 F.2d at 1180, leaving no room for such state remedies to correct the failure to give notice to the IRS, even though I.R.C. § 7425 was intended only to ensure that an IRS lien could not be extinguished by a state foreclosure proceeding of which the IRS had no notice.

If the Tenth Circuit's conclusion is not reversed by this Court, remedies that numerous states have provided to innocent purchasers of foreclosure

properties would be placed in jeopardy or in doubt when the IRS is an omitted party. Such remedies play an important role in state foreclosure law. They ensure that omitted parties, after being given proper notice, are afforded a fair opportunity to exercise their rights so that such liens do not become a long-lasting cloud on the titles of innocent purchasers.

This Court has been vigilant in protecting the state foreclosure process from destabilizing misinterpretations of federal law. *See, e.g., BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). The Tenth Circuit's decision here creates such a problem, displacing state law without clear federal authorization and providing the IRS with an unintended windfall when it does not receive notice of a foreclosure sale. The decision threatens an "essential state interest" in the "'security of titles to real estate'" by placing a "federally created cloud" on such titles. *Id.* at 544 (citation omitted). At this time of rising foreclosures and skyrocketing federal tax liens, this Court should grant review to protect the security of real estate titles arising from foreclosure proceedings.

ARGUMENT

I. POST-FORECLOSURE REMEDIES TO ADDRESS OMITTED IRS LIENS ARE NECESSARY TO ASSURE CLEAR TITLES.

A. A Major Purpose Of Foreclosure Is To Enable Properties Encumbered With Liens To Be Sold With Clear Titles.

To understand the potential impact of the *Russell* decision, it is important to understand the foreclosure process, the problems that arise when a junior lienholder does not receive notice of the foreclosure, and how the various states have attempted to address those problems in a way that is fair and equitable to both the innocent purchaser of the foreclosed property[2] and the omitted junior lienholder.

The foreclosure process serves two distinct purposes. It enables persons holding liens on the property, most often a mortgage lender who holds the senior lien, to recover some of its investment by selling the secured property when the loan is in default. It also enables properties that have been burdened with liens by unpaid creditors to be sold to buyers with the titles unburdened by such liens.

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[2] The Russells, the petitioners in this case, are consumers who purchased their home from the foreclosure sale purchaser, the mortgage lender who had instituted the foreclosure proceeding to which the IRS had not received notice. For ease of reference, "foreclosure sale purchaser" as used hereafter includes any subsequent *bona fide* purchaser for value of the foreclosed property.

> It is a fundamental principle of mortgage law that a valid judicial foreclosure of a senior mortgage terminates not only the owner's title and equitable redemption rights, but also all other junior interests whose holders were made parties defendant. A power of sale (nonjudicial) foreclosure that complies with applicable statutory notice and related requirements accomplishes the same result. Thus, a purchaser at a foreclosure sale not only acquires the previous owner's interests in the real estate, but a title free and clear of all other properly joined interests that were junior to the foreclosed lien.

Restatement (Third) of Property: Mortgages § 7.1 cmt. (a) (1997).

B. For Various Reasons Junior Lienholders May Not Receive Notice Of The Foreclosure Sale.

In most states, if a party with a lien on the property is omitted from the foreclosure process, the foreclosure does not affect its lien. Restatement (Third) of Property: Mortgages § 7.1, cmt (b) (1997); Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* 823, 824 (5th ed. 2007) (citing cases). Such omissions are not infrequent, and generally occur without any fault on the part of the foreclosing lender or the foreclosure sale purchaser.

There are many reasons why junior lienholders may not be identified and provided notice of the foreclosure sale. Determining who should be provided notice is based on a search of land records maintained by

approximately 3400 county and local record offices across the nation. This search is generally undertaken by a title company or independent searcher. Today, land records are generally maintained as automated databases. Utilization of these databases requires the use of an index or indices that make records accessible by referring the researcher to the names of parties, recording information (book, page, or instrument numbers), property description (lot and block, and/or tax identifying numbers), and some description of the recorded instrument. Since no document format has garnered general acceptance, there are significant variations in the format, creation and maintenance of county and local land records.

Whether the search is undertaken the old-fashioned way through a search of dusty stacks of grantor-grantee title books, or is undertaken with the assistance of modern computer databases, the possibility of a misfiling or of human error in overlooking a lien may derail even the most conscientious search.

The risk of an error is increased in the case of federal tax liens because such liens are filed against the taxpayer in a county records center indexed by the name of the taxpayer, rather than being filed in a grantor-grantee index or other file that contains information about a specific parcel of property. Tax liens are created by the IRS recording a "Notice of Federal Tax Lien." This document recites the name of the taxpayer, his or her social security number, and street address. By federal statute, the federal tax lien attaches to all real property owned by the taxpayer in the county where it is recorded, even though the Notice itself does not

identify any specific property owned by the taxpayer. Connecting the IRS lien against an individual to property that might be owned by that individual requires a title searcher to tie this limited information in the IRS Notice filed in a general index (organized according to names) to the owner of particular properties that will be found in the grantor-grantee index or in some other index organized by the legal description of the property.

The complexity of the title searcher's task to link names on IRS liens with names in property records is exacerbated by the variety of names that people may use or how their name may be transcribed by others. Omitted middle initials, the use of an "Americanized" name, use of a nickname, or a switch from a maiden to a married name, can result in the most conscientious searcher overlooking a valid lien. Moreover, there is the ever-present problem of common or ethnic names. Searches for common names such as John Smith or Robert Johnson can generate a flood of records of properties owned by a person other than the taxpayer. Ascertaining the applicability of a particular lien to a property, particularly in a populous county with many similar ethnic names (such as Ramirez, or Nguyen, or Park), is a complex and inexact science that may be like the proverbial search for a needle in the haystack. Case law is replete with real-life examples of searches derailed by variations in names.[3]

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[3] *See e.g.*, *Kivel v. United States*, 878 F.2d 301 (9th Cir. 1989) (lien notice against "Bobbie Morgan" where property was held by "Bobbie Morgan Lane"); *United States v. Polk*, 822 F.2d 871 (Cont'd)

In recognition of the reality that not all junior lienholders may be identified and given notice of a foreclosure, the states have developed various mechanisms, whether under their common law or by statute, to enable an innocent foreclosure purchaser, or a subsequent purchaser, to clear (or "quiet") the title against a junior lienholder omitted from the foreclosure process. The Colorado statute at issue in this case, Colo. Rev. Stat. §§ 38-38-501 and 38-38-506, provides one example of post-foreclosure sale remedies available across the nation for the innocent purchaser.

C. States Have Developed Various Mechanisms For Preventing Omitted Parties From Clouding The Titles For Unduly Long Periods.

Remedies are necessary for the innocent foreclosure sale purchaser because omitted parties can take actions that threaten the purchaser's title to and enjoyment of the property.

Depending on the state, omitted junior lienholders generally have two options in the wake of a foreclosure

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(Cont'd)

(9th Cir. 1987) (lien notice named "Roy Bruce Polk" but property was listed for "Bruce Polk"); *Richter's Loan Co. v. United States*, 235 F.2d 753 (5th Cir. 1956) (lien against "Freidlander" instead of "Friendlander"); *Brightwell v. United States*, 805 F. Supp. 1464, 1466-67 (S.D. Ind. 1992) (IRS lien named "William S. Van Horn" rather than "William B. VanHorn"); *Haye v. United States*, 461 F. Supp. 1168, 1169 (C.D. Cal. 1978) (lien for "Manual de J. Castello" when correct name was "Maneul J. de Castillo"); *United States v. Sirico*, 247 F. Supp. 421, 422 (S.D.N.Y. 1965) (lien against "George and A. Sirico" where title documents listed "Assunta Sirico" as property owner).

sale for which they were not given notice. First, they can foreclose on their own liens, which, as noted above, remain valid. Alternatively, they can seek to exercise their right of redemption by tendering to the foreclosure purchaser "the obligation that was owed on the senior mortgage at the time of its foreclosure." Restatement (Third) of Property: Mortgages § 7.1, at 452 (1997); *see also* Nelson & Whitman, *supra*, at 825 (citing cases); Robert H. Bomar, *Mortgage Foreclosure in New York: Omitted Lienors*, 22 Real Prop. Prob. & Tr. J. 509 (1987).

Since there may be no time limit on the exercise of these rights, such omitted liens can be very disruptive to the settled expectations of the foreclosure sale purchaser and create a serious cloud on the title.

To ameliorate this problem, states have developed statutory or common law mechanisms that enable the foreclosure sale purchaser to take steps to require the omitted junior lienholder to exercise the same or similar rights that it would have had if it had received notice of the original foreclosure, or have that junior lien extinguished as against the new, innocent landowner.[4]

One mechanism is for the foreclosure sale purchaser to institute re-foreclosure proceedings after giving notice to the junior lienholder who was omitted from the first foreclosure proceeding. *See* Nelson & Whitman, *supra*, at 829 (citing cases). Some states, such as

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[4] Of course, the IRS's claim for back taxes is still valid against the original landowner who failed to pay the taxes, and properly filed IRS liens remain valid against any other property owned by that person.

Colorado, also permit the foreclosure sale purchaser to require that, within a court-determined period of time, the omitted lienholder exercise the right of redemption it would have had prior to the original foreclosure proceeding to pay off the senior lien and obtain title to the property. *Id.* at 830.[5] Such procedures are sometimes referred to as "strict foreclosure" in that the rights of the omitted party will be foreclosed if it does not exercise its redemption rights without the necessity for holding a public sale (as would take place in the case of judicial or nonjudicial foreclosure sales). Such procedures effectively give the IRS (or any omitted junior lienholder) the right to take the property if its value exceeds that of the senior lien paid off in the foreclosure.

Several other states, including, New York, Oregon, and Wyoming, have enacted "strict foreclosure" statutes like the Colorado statute.[6] Other states, such as Florida, Nebraska, New Jersey, and South Carolina make similar procedures available as a matter of equity under their common law. *See, e.g., Miami-Dade County v. Imagine Properties, Inc.*, 752 So.2d 129 (Fla. Dist. Ct. App. 2000); *Miles v. Stehle*, 36 N.W. 142 (Neb. 1888); *Citicorp Mtge.*

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[5] Prior to a foreclosure sale, a junior lienholder has an equitable right to "redeem" the lien of the senior foreclosing lender and thus to preserve its ability to enforce both its own lien and the senior lien it will acquire. The foreclosure sale generally cuts off that right of redemption if the junior lienholder received notice of the sale. *See* Restatement (Third) of Property: Mortgages § 7.1. at 452.

[6] N.Y. Real Prop. Acts. and Proc. Law (RPAPL) § 1352 (2009); Or. Rev. Stat. § 312.150; Wyo. Stat. Ann. § 1-18-114.

Inc., v. Pessin, 570 A.2d 481 (N.J. Super. Ct. App. Div. 1990); *Union Nat'l Bank of Columbia v. Cook*, 110 S.C. 99, 96 S.E. 484 (1918).

These procedures give the omitted junior holder, here the IRS, the same rights that would have been available to it in the original foreclosure, specifically notice and the opportunity to redeem. But by placing a time limit for the omitted party to exercise that right, the Colorado statute enabled the Russells to obtain clear title free of that lien if the IRS elected not to redeem within the time established by the court.

II. THE TENTH CIRCUIT'S DECISION THREATENS ALL STATE POST-FORECLOSURE REMEDIES AFFECTING OMITTED IRS LIENS.

The Tenth Circuit held that Colorado's post-foreclosure procedure was preempted because federal law said that a foreclosure sale without notice to the IRS does not eliminate the IRS lien. This threatens vital state interests in post-foreclosure sale remedies without clear authorization from Congress.

A. The Tenth Circuit's Decision Conflicts With This Court's Admonition As To The Clarity With Which Congress Must Speak Before State Laws Affecting Foreclosures Will Be Preempted.

This Court has recognized that states have a vital interest in an effective foreclosure process. The alternative is to place "every piece of realty purchased

at a foreclosure . . . under a federally created cloud." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). In *BFP*, this Court considered whether a foreclosure sale conducted in compliance with California law should be set aside under a provision of the bankruptcy law, 11 U.S.C. § 548(d)(2)(a) (2006), as being for less than its "'reasonab[le] equivalent value'." 511 U.S. at 534-36. In affirming the sale, this Court traced the history of modern foreclosure law to the courts of chancery in England, whose enthusiasm for the borrower's "'equity of redemption'" "left lenders in a quandary, since title to forfeited property could remain clouded for years after law day [the original due date]." *Id.* at 541.

"To meet this problem, courts created the equitable remedy of foreclosure: after a certain date, the borrower would be forever foreclosed from exercising his equity of redemption." *Id.* In the years since, the "States have created diverse networks of judicially and legislatively crafted rules governing the foreclosure process, to achieve what each of them considers the proper balance between the needs of lenders and borrowers." *Id.* at 541-42. In determining whether to set the *BFP* sale aside, the Court noted that the sale comported with state foreclosure law, and that to set it aside would superimpose an additional layer of federal requirements. *Id.* at 542-43.

While Congress has the power to modify or abrogate state law, the Court would not "presume such a radical departure" in the absence of clear textual guidance. *Id.* at 543. "Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its

effect." *Id.* at 539. To displace traditional State regulation in this area, the federal statutory purpose must be "'clear and manifest'," *Id.* at 544 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

In this case, the Tenth Circuit did not identify anything in the language or legislative history of I.R.C. § 7425 manifesting clear congressional intent to displace state law equitable principles or remedies provided to foreclosure sale purchasers to remedy the consequences of an omitted IRS lien. It relied solely on legislative history fragments indicating that the government must receive notice before its lien can be extinguished. *Russell*, 551 F.3d at 1180. That proposition is unexceptional, and the legislative history relied upon by the court below does not rise to the level of the *BFP/General Electric* requirement that the federal statutory intent to displace state laws in this area must be "clear and manifest."

In relying on a small excerpt of legislative history to displace a considerable body state law, the Tenth Circuit ignored the limited purpose of the statute: to give "the Government an opportunity to review its position and determine the appropriate action without placing an undue burden on a foreclosing creditor." S. Rep. No. 89-1708 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3722, 3748. The Report makes clear that I.R.C. § 7425 was aimed at the situation "where the interests of junior lienors may be eliminated without notice" because in that scenario "the interests of the Government are not presently sufficiently protected." *Id.* at 3748.

But that was not the situation in *Russell*. The IRS was entitled to both notice and the opportunity to protect its interest. The Colorado statute specifically requires notice to the IRS and the opportunity for it to redeem prior to the extinguishment of its lien against the innocent purchaser. *See* Colo. Rev. Stat. § 38-38-501. And federal law recognizes redemption as a means of resolving omitted IRS liens. *See* I.R.C. § 7425(d).

B. The Tenth Circuit's Decision Threatens To Undermine All State Law Mechanisms For Addressing Omitted IRS Liens.

Even though I.R.C. § 7425 says only that a tax lien cannot be extinguished if the IRS does not receive notice of the foreclosure sale, the court below reasoned that Colorado's post-sale remedy of providing the IRS with an opportunity to redeem or risk the loss of its lien against the property was in conflict with Congress's occupation of the field. *Russell*, 551 F.3d at 1180. This holding threatens all state strict foreclosure remedies as applied to IRS liens, whether such remedies are created by statute or by the common law. *See* discussion *supra*, at 10-12. That, in itself, would justify the Court's granting review. However, the broad basis on which the court found preemption—occupation of the field—potentially places in jeopardy other state law mechanisms that are provided to remedy or mitigate the potentially inequitable consequences of the IRS being able to assert lien rights against an innocent purchaser.

Thus, for example, if the *Russell* decision is good law, state laws (both statutory and under the common

law) that permit a foreclosure sale purchaser to cure the problem of an omitted party by re-foreclosing after giving notice to the omitted party could be argued to be preempted as against the IRS.

But the potential problems are even greater. There is a common principle that underlies all state law remedies provided to foreclosure sale purchasers when an omitted party seeks to take advantage of the lack of notice to assert its lien against those purchasers. That principle is that the lien of the foreclosing senior lienor (typically the mortgage lender)—normally merged into the fee as a result of the foreclosure sale—will be revived so that it can be asserted against the omitted junior lienholder by the foreclosure sale purchaser. *See* Nelson & Whitman, *supra*, § 7.15 at 825-28; George M. Platt, *The Dracula Mortgage: Creature of the Omitted Junior Lienholder*, 67 Or. L. Rev. 287 (1988).[7]

The fundamental unfairness that this principle seeks to remedy is easy to appreciate. Assume a property with a $300,000 senior mortgage lien and a $100,000 tax lien, is sold at foreclosure for $250,000. If the IRS had been given notice of the sale, it would not have recovered

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[7] Prof. Platt's article is both entertaining and instructive. He refers to the senior mortgage lien that is revived when an omitted junior lienholder seeks to assert its claim against an innocent foreclosure sale purchaser as a "Dracula lien." That lien is "dead" if there are no omitted junior lienholders in the foreclosure sale, but it becomes "alive" with respect to any omitted junior lienholder and may be asserted by the new owner so as to prevent the omitted junior lienholder from benefiting unreasonably from the fact it was omitted from the original foreclosure.

anything on its lien because the value of the property was "under water" with regard to the amount of the senior mortgage lien.[8] In these circumstances, it would be highly inequitable for the IRS to be able to take advantage of the fact that it did not receive notice of the foreclosure sale to seek to enforce its lien against the innocent purchaser of the foreclosed property as if it now had a first lien on the property. The equitable principle of allowing the innocent purchaser to take advantage of the revived senior lien is intended to ensure that the IRS does not obtain a greater economic benefit by not having received notice than if it had received notice.

This state law principle—which underlies Colorado's statute—also underlies the remedy provided under the laws of most states when the IRS asserts its omitted tax lien against the purchaser out of the foreclosure: that the innocent purchaser can assert the rights of lienors who were senior to the omitted junior lienholder. Other federal appellate courts have concluded that such post-foreclosure sale state law remedies are not preempted as against an omitted IRS lien. *See Tompkins v. United States*, 946 F.2d 817 (11th Cir. 1991); *First Am. Title Ins. Co. v. United States*, 848 F.2d 969

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[8] With the decline in real estate values in recent years, a great many homeowners across the country are "under water" in this regard. *See* Sheryl Gay Stolberg & Edmund L. Andrews, *$275 Billion Plan Seeks to Address Housing Crisis*, N.Y. Times, Feb. 19, 2009, at A1. As a consequence, the value of such properties is not high enough to even cover the amount of the senior mortgage lien, much less provide any prospect that the sale of the property, at foreclosure or otherwise, would yield enough to pay off all or part of the IRS's junior tax lien.

(9th Cir. 1988). Thus, the Tenth Circuit's decision here creates a clear conflict with those decisions.

C. The Tenth Circuit's Decision Provides An Inequitable Advantage To The IRS While Significantly Undermining State Law Remedies Without Explicit Statutory Direction.

The practical effects of the *Russell* holding are perverse. An innocent failure to provide pre-foreclosure notice to the IRS puts the government in a *better* position than if it had actually received notice under the provisions of I.R.C. § 7425, because it now has a lien that may be impossible to extinguish without being paid off. This omission also enables the IRS to proceed against wholly innocent parties, such as the Russells, who are complete strangers to the original tax controversy and to the foreclosure itself. Moreover, such innocent parties would not appear to be allowed to take advantage of state laws that permit them to assert the revived rights of the former senior lienholders against the IRS. By any measure, *Russell* gives the government a confiscatory windfall far beyond the limited purpose intended by Congress: ensuring the IRS was notified prior to a foreclosure proceeding that extinguished its interests.

The sweeping nature of the *Russell* holding is particularly problematic because

> Federal statutes impinging upon important state interests 'cannot . . . be construed without regard to the implications of our dual

> system of government. . . . [W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise, and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.'

BFP, 511 U.S. at 544 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539-40 (1947) (alteration in original)).

This Court has emphasized that the marketability of titles and orderly administration of foreclosure processes reflect a vital state interest: "It is beyond question that an essential state interest is at issue here." *BFP*, 511 U.S. at 544 (citing *Am. Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911)). The Court reiterated its prior observations that "'the general welfare of society is involved in the security of the titles to real estate,'" and the power to ensure that security "'inheres in the very nature of [state] government.'" *Id.* (citation omitted) (alteration in original).

Russell's expansive holding that "it is clear Congress intended federal law to 'occupy the field' in revolving such federal tax lien issues," 551 F.3d at 1180, is not only squarely at odds with *Tompkins* and *First American*, but also jeopardizes virtually every state foreclosure remedy that seeks to address the problem of an omitted IRS lien.

III. REVIEW IS NEEDED TO PREVENT ADVERSE EFFECTS ON REAL ESTATE MARKETS.

As a consequence of the current global economic downturn, the number of transactions that may be affected by the *Russell* decision is far greater now than at any other time in recent memory. The annual number of federal tax liens filed has skyrocketed from 167,867 in 1999 to 768,168 in 2008. *Internal Revenue Service Data Book 2008*, at 41 (2008). The federal government has more than a million tax liens outstanding at this time. Josh Brown, *IRS initiative aims to help people sell homes*, Virginian-Pilot & Ledger Stat (Norfolk VA), Dec. 17, 2008, at 3.

Likewise, the number of foreclosures has, unfortunately, skyrocketed. According to the Mortgage Bankers Association, nearly 5.4 million (or 12%) of the country's 45 million home loans were delinquent or in some stage of the foreclosure process in the first three months of 2009. Jack Healy, *More Homeowners Facing Foreclosure*, N.Y. Times, May 29, 2009, at B5. With a million outstanding federal tax liens, a significant portion of foreclosures will involve tax issues, since families struggling to pay their mortgages will also frequently be delinquent in their tax obligations.

Foreclosure sales, while distressing because of the adverse impact on the owners who were unable to pay their mortgages, are important for the healthy functioning of real estate markets. That is why states enact statutes "aimed at enhancing the finality of power of sale foreclosure and the marketability of titles it

produces." Restatement (Third) of Property: Mortgages § 7.1, at 457. Even the IRS has acknowledged that its million plus liens are deterring potential buyers from bidding on foreclosed homes. Jim Wasserman, *Troubled homeowners get a break from IRS*, Sacramento Bee, Dec. 17, 2008, at B9.

Russell compounds the problems for innocent foreclosure sale purchasers at a terrible time for the American economy. Not only does a completely innocent purchaser at a foreclosure sale face the risk of being subjected to the overlooked tax lien, but, upon discovering that lien, *Russell* leaves the purchaser with few, if any, options otherwise available under state law. Attempting to extinguish the lien by doing precisely what I.R.C. § 7425 sought to induce him to do—notifying the IRS and offering it the opportunity to redeem—is impermissible under *Russell*. The purchaser will be condemned to carry the lien against the property unless he is willing to pay the IRS a debt he did not incur and of which he was unaware when he purchased the property.[9] This can only result in deterring potential buyers from being willing to purchase properties out of foreclosure.

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[9] The ultimate burden will be borne by innocent property purchasers even though certain courts are inclined to believe insurers will absorb the loss. *See e.g.*, *Deutsche Bank v. Dill*, 903 N.E.2d 166, 170-71 n.4 (Ind. Ct. App. 2009). Many properties purchased out of foreclosure are not covered by title insurance. Moreover, title insurers typically react to such pervasive problems by taking exceptions to the coverage of such risks. *See BFP*, 511 U.S. at 544 ("Already, title insurers have reacted to the [pre-*BFP*] rule by including specially crafted exceptions from coverage in many policies issues for properties purchased at foreclosure sales.").

In *BFP*, this Court cautioned against interpretations of federal law that would place a "federally created cloud" over real estate titles and thus undermine an essential state interest. 511 U.S. at 544. The decision below does precisely that.

CONCLUSION

For the reasons discussed above and in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

SHELDON E. HOCHBERG
Counsel of Record
CHARLES G. COLE
SAAD GUL
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Amicus Curiae
American Land Title Association